FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 859.

C. L. ASHTON, ET AL., *Petitioners*,

v.

CAMERON COUNTY WATER IMPROVEMENT DISTRICT NO. 1, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF JOHN D. McCALL, AMICUS CURIAE.

JOHN D. McCALL,
Amicus Curiae.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The undersigned respectfully represents to the Court:

(1) That he is a lawyer duly admitted in this Court; that his business consists principally in matters pertaining to the issuance of bonds by municipal and other public corporations and in the examination and approval for such bonds. At present he is serving as bond counsel for several municipal and other public corporations which are now in process of refinancing their indebtedness, including thirteen Water Improvement or Irrigation Districts in the State of Texas. The duty accepted by the undersigned insofar as the Texas Irrigation and Water Improvement Districts are concerned is to cooperate with the several districts in the refinancing proceedings, and ultimately to approve the legality of refunding bonds to be issued by the several districts in exchange for the present securities, to the end that his approving opinion will be available to the subsequent holders of said bonds;

(2) That concerning said Texas districts, the following tabulation discloses concerning each, its present outstanding indebtedness and the percentage of said outstanding indebtedness committed to the refinancing plant, to wit:

Name of District	Amount of Present Debt	Percentage on Which Consents Available (Approximate)
Cameron County Water Improvement District No. 2	$556,500.00	92
La Feria Water Control and Improvement District, Cameron County No. 3	1,255,960.00	84
Cameron County Water Control and Improvement District No. 5	1,312,233.00	91
Cameron County Water Control and Improvement District No. 6	452,175.04	88
Cameron County Water Improvement District No. 11	896,933.08	100
Hidalgo County Water Control and Improvement District No. 1	2,088,458.52	90
Hidalgo County Water Improvement District No. 2	2,721,234.00	96
Hidalgo County Water Improvement District No. 3	296,136.45	84
Hidalgo County Water Improvement District No. 5	504,525.00	95
Donna Irrigation District, Hidalgo County No. 1	1,874,165.75	93
Pecos County Water Improvement District No. 1	63,240.00	91
Reeves County Water Improvement District No. 1	241,227.00	84
Ward County Irrigation District No. 1	113,390.19	97

(3) That each district above described has powers and duties similar to those of respondent District.

(4) That the efficacy of Section 80 of the National Bankruptcy Act is important to the undersigned and to said several districts because in each instance (wherein the holders of less than 100 per cent have consented) consents are available immediately in sufficient proportion to assure completion of such refinancing plan, if recourse should be made to the Bankruptcy Court, contingent alone on the finding by such Court that the refinancing plan is reasonable;

(5) That if said Act should be held unconstitutional said refinancing plans could be defeated by minority bondholders;

(6) That the protection of the Municipal Bankruptcy Act against the attack on its constitutionality is of vital importance to said districts and to the majority bondholders of said districts;

WHEREFORE, with the consent of counsel for petitioners having been obtained for the filing hereof, the undersigned respectfully moves this Honorable Court for leave to file the accompanying brief as Amicus Curiae.

JOHN D. MCCALL,
Amicus Curiae.

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Respondent.

BRIEF OF JOHN D. McCALL, AMICUS CURIAE.

Preliminary Statement.

The brief of respondent expresses the views of your petitioner and in his opinion clearly establishes the constitutionality of Section 80 of the National Bankruptcy Act. If this brief serves any useful purpose, it is to call the Court's attention to three additional points in support of the constitutionality of the Act.

ARGUMENT.

Summary of Argument.

POINT 1

The functions and services performed by respondent district are identical with the functions and services performed by private corporations organized under the laws of Texas for irrigation purposes. Such private corporations have recourse to the Bankruptcy Courts. It is reasonable to concede to respondent district benefits of the Bankruptcy Act.

POINT 2

Attention of the Court is directed to a case not cited in respondent's brief; viz: *Cartaret County et al* v. *Sovereign Camp, Woodmen of the World,* No. 3819, decided by the Circuit Court of Appeals of the Fourth Circuit on June 3, 1935, 78 Fed. (2nd) 337.

POINT 3

The petitioners, having intervened generally in the suit, cannot challenge the propriety of the proceedings below.

Point 1.

THE FUNCTIONS AND SERVICES PERFORMED BY RESPONDENT DISTRICT ARE IDENTICAL WITH THE FUNCTIONS AND SERVICES PERFORMED BY PRIVATE CORPORATIONS ORGANIZED UNDER THE LAWS OF TEXAS FOR IRRIGATION PURPOSES. SUCH PRIVATE CORPORATIONS HAVE RECOURSE TO THE BANKRUPTCY COURTS. IT IS REASONABLE TO CONCEDE TO RESPONDENT DISTRICT BENEFITS OF THE BANKRUPTCY ACT.

Under the laws of the State of Texas, private corporations may be organized to distribute water for irrigation

purposes. Article 1301 of the Revised Civil Statutes of the State of Texas, 1925 Revision, prescribes the purposes for which private corporations may be organized. Each permitted purpose is contained in a numbered subdivision of said article. Under any one of five subdivisions an irrigation corporation may be organized. For the immediate convenience of the Court, subdivisions 32, 88, 28, 30 and 31 of Article 1301 are copied herein as follows:

Subdiv. 32.

"To construct, maintain, and operate canals, ditches, flumes, feeders, laterals, dams, reservoirs, lakes, and wells, and for conserving, storing, conducting and transferring water to all persons entitled to the use of the same for irrigation, mining, milling, manufacturing, the development of power to cities and towns for waterworks and for stock-raising."

Subdiv. 88.

"Private corporations may be created for, or after being created, may so amend their charters to include two or more of the following purposes, namely: the supply of water to the public for irrigation, power, municipal or domestic purposes; the manufacture of and supply of ice to the public. . . ."

Subdiv. 28.

"To grow, prepare for market and sell rice, with power to construct, maintain and operate dams . . . canals, flumes, laterals, and other appurtenances as may be necessary or convenient for the purpose of irrigating."

Subdiv. 30.

"To construct, maintain and operate canals, drains, and ditches outside the corporate limits of cities and towns in any County in Texas."

Subdiv. 31.

"To excavate, maintain and operate drainage ditches, canals, and flumes with power to condemn

lands necessary for the right of way and machinery plants for such drainage ditches, canals, and flumes."

The several subdivisions quoted were adopted by the legislature from time to time during the forty years preceding the 1925 revisions of statutes. Respondent district has the powers and performs the functions permitted to water improvement districts established pursuant to the provisions of Chapter 172 of the General Laws of the State of Texas Passed at the Regular Session of the Thirty-third Legislature in 1913 and the provisions of Chapter 87 of the General Laws of the State of Texas Passed at the Regular Session of the Thirty-fifth Legislature in 1917, including therein the provisions of Section 24 of said Chapter 87 of the General Laws of the State of Texas Passed at the Regular Session of the Thirty-fifth Legislature in 1917, to wit:

"Districts created under the provisions of this Act are hereby empowered to own and construct reservoirs, dams, wells; canals, etc., and to acquire the necessary rights of way for and buy or construct all reservoirs, dams, wells, canals, laterals, sites for pumping plants and all other improvements required for the irrigation of the lands in such district by gift, grant, purchase or condemnation and they may acquire the title to any and all lands necessary or incident to the successful operation thereof, in addition to any of the above, in the manner provided, including the authority by purchase or condemnation, to acquire rights of way for the enlargement, extension or improvement of any existing canals, or ditches for the purpose of raising such canals and ditches jointly with the owners thereof."

An examination of the statutes in reference to the functions of *private* irrigation companies and an examination of the statute delineating the powers of irrigation districts discloses that each has all of the powers granted to the other insofar as irrigation service is concerned. The dif-

ference, of course between the two is that machinery, equipment, etc. for private corporations is obtained through expenditure of its capital or through issuance of its corporate bonds, whereas money for these purposes is made available to an irrigation district through issuance of tax supported bonds.

This case was not tried on its merits and hence no evidence was adduced, but the record shows (R. 56) that the district "was created as a promotion project for the colonization of lands". If the case were tried on its merits, the evidence would show that the district purchased the nucleus of its present irrigation system from a private corporation, which theretofore was serving the lands now constituting the district.

Prior to the adoption of Article 3, Section 52 of the Constitution of Texas in 1903, there was no authority for the legislature to provide for the organization of irrigation or water improvement districts. Until that time the only methods through which a land owner could obtain the benefits of irrigation were to construct irrigation equipment for himself or to patronize a private corporation performing that service. The Supreme Court of Texas has held that private irrigation companies are quasi-public corporations. See *Imperial Irrigation Company* v. *Jayne*, 104 Texas 398; and *Bordew, et al* v. *Trespalacios Rice & Irrigation Company*, 98 Texas 494.

Even at the expense of becoming tedious, the parallel has been drawn to show the identity of services performed by private irrigation corporations and by irrigation and water improvement districts. Apparently there is justification in the contention that respondent district shonld not be denied the right to the benefits of the Bankruptcy Act when private corporations performing identical services have immediate recourse to the benefits of the Act.

Point 2.

ATTENTION OF THE COURT IS DIRECTED TO A CASE NOT CITED IN RESPONDENT'S BRIEF; VIZ: CARTARET COUNTY ET AL. VS. SOVEREIGN CAMP, WOODMEN OF THE WORLD, NO. 3819, DECIDED BY THE CIRCUIT COURT OF APPEALS OF THE FOURTH CIRCUIT ON JUNE 3, 1935, 78 FED. (2nd) 337.

This opinion was written by Judge Parker. A reading of the opinion indicates that Section 80 of the National Bankruptcy Act had the approval of the Court of Appeals of the Fourth Circuit.

Point 3.

THE PETITIONERS, HAVING INTERVENED GENERALLY IN THE SUIT, CANNOT CHALLENGE THE PROPRIETY OF THE PROCEEDINGS BELOW.

The petitioners *intervened generally*[1] in the District Court proceedings (R. 52-53). Equity Rule 37 provides that "intervention shall be in subordination to and in recognition of the propriety of the main proceeding". That rule is a recognition of the principle that parties cannot "deny a jurisdiction to which they voluntarily submitted". *McGoon* v. *Scales*, 9 Wall. 23, 32. It is generally followed in equity receivership proceedings. *King* v. *Barr*, (C. C. A. 9th) 262 Fed. 56, cert. denied 253 U. S. 484; *Union Trust Co.* v. *Jones* (C. C. A.-4th) 16 Fed. (2d) 236. In the latter case, the court in denying the right of an intervenor to challenge the jurisdiction of a receivership said (p. 239):

> "The position of the appellant, Union Trust Company, that upon intervention of the trustees under the mortgage the proceedings should have been dismissed,

[1] In their petitions for intervention the petitioners asked leave "to intervene herein and to be heard on all questions arising in the proceedings * * *" (R. 52). The order granting the petition for intervention reads in part as follows (R. 53-54):

> "It is hereby ordered that the aforesaid applicants be and they are hereby granted leave to intervene herein and to be heard on all questions arising in this proceeding and all issues raised by the aforesaid parties as contestants herein."

and that in what was done to the contrary the Court was without jurisdiction, is clearly untenable. In any event, appellant itself, as intervenor in the same litigation to assert its unsecured indebtedness, was not in a position to make such claim. *It could not intervene in and seek the aid of the Court and at the same time attack and dispossess the Court of its jurisdiction to proceed with the litigation in an orderly way.*" (Italics added.)

Although the equity rules are not necessarily controlling in bankruptcy proceedings (*Daniel* v. *Guaranty Trust Co.*, 285 U. S. 154), it is believed that the principle announced by Rule 37 is of general application,[1] especially since the petitioners could have been heard without intervening.[2] Having chosen to intervene the petitioners would seem to have no basis for attacking the jurisdiction of the District Court at this juncture of the proceedings.

CONCLUSION.

It is respectfully suggested that, for reasons stated and based on authorities cited in Respondent's brief, the constitutionality of Section 80 of the National Bankruptcy Act should be sustained; that on account of the character of the functions performed by respondent district, it is entitled to the benefits of said Act at all events; and that petitioners were not in position to challenge the jurisdiction of the Court in which they intervened generally.

Respectfully submitted,

JOHN D. MCCALL,
Amicus Curiae.

JOHN D. MCCALL,
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Dallas, Texas.

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[1] See history of Rule 37, Hopkins Equity Rules, 8th Edition, p. 232.

[2] Section 80 (e) of the Bankruptcy Act provides:

"Any creditor shall be heard on the question of the proposed confirmation of the plan, and, upon filing a petition for leave to intervene, on such other questions arising in the proceeding as the judge shall determine."